No. 87-1508

In The

Supreme Court of the United States

October Term, 1987

BEAN DREDGING CORPORATION,

Petitioner,

vs.

MARTHA B. OLSEN, COMMISSIONER OF REVENUE OF THE STATE OF TENNESSEE,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Tennessee

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Respondent is dissatisfied with the petitioner's statement of the questions presented, and submits that this petition requires the Court's consideration of the following questions:

1. Whether a petitioner may raise before this Court an issue which it expressly conceded in the courts below and which, though included in the petitioner's original complaint, was not addressed in the lower courts because of petitioner's concession?

2. Whether a state, consistent with the Commerce Clause, may impose its general sales and use tax upon the use of a dredge operating and anchoring within the territory of that state and engaged in the maintenance of an interstate waterway?

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Respondent Martha B. Olsen, Commissioner of Revenue of the State of Tennessee, hereby responds to and opposes the issuance of a writ of certiorari to review the judgment of the Supreme Court of Tennessee.

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee, of which review is sought, is reported at 742 S.W.2d 259 (Tenn. 1987). It is also reproduced in Petitioner's Appendix at 2. The Final Decree and oral ruling of the

trial court, the Chancery Court of Shelby County, Tennessee, are unpublished and are reproduced in Petitioner's Appendix at 36 and 38, respectively. [Petitioner's Appendix is hereinafter abbreviated as "Pet. App." References to the record are denoted herein by the abbreviation "R." The transcript of the trial is indicated by the abbreviation "Tr."]

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CONSTITUTIONAL PROVISIONS AND STATUTES

The Commerce Clause of the United States Constitution:

> The Congress shall have power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .

U.S. CONST., Art. I, § 8, cl. 3.

United States Code:

> 28 U.S.C. § 1257(3)
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or

claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Tennessee Code Annotated:

TENN. CODE ANN. § 67-6-102(16) [formerly § 67-3002(g)]

"Storage" means and includes any keeping or retention in this state of tangible personal property for use or consumption in this state, or for any purpose other than sale at retail in the regular course of business ....

TENN. CODE ANN. § 67-6-201 [formerly § 67-3003]

It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who uses or consumes in this state any item or article of tangible personal property as defined in this chapter, irrespective of the ownership thereof or any tax immunity which may be enjoyed by the owner thereof, or who is the recipient of any of the things or services taxable under this chapter, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter, or who leases or rents such property, either as lessor or lessee, within the state of Tennessee, or who charges admission, dues or fees taxable under this chapter, or who sells space under this chapter.

TENN. CODE ANN. § 67-6-210 [formerly § 67-3005]

(a) On all tangible personal property imported or caused to be imported from other states or foreign countries, and used by him, the "dealer" as defined in § 67-6-102(4), shall pay the tax imposed by this

chapter on all articles of tangible personal property so imported and used, the same as if the articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

(b) It is not the intention of this section to levy the use tax with respect to the personal automobile, the personal manufactured home as defined in § 68-36-202(6), the personal effects, or the household furniture to be used in the residence of a person who, having been a bona fide resident of another state, has moved to and become a resident of Tennessee, and has caused to be imported into Tennessee such personal automobile, personal manufactured home as defined in § 68-36-202(6), personal effects, or household furnishing.

TENN. CODE ANN. § 67-6-321 [formerly § 67-3012(8)]

There shall be exempt from sales tax the transfer, by any dealer in personal property, of railroad rolling stock or of vessels or barges of fifty (50) tons or over of displacement where the purchaser gives the seller an affidavit that such vessels or rolling stock are being purchased for use in interstate commerce or outside the state of Tennessee; and any such vessel or rolling stock shall also be exempt from use tax so long as it is being used in interstate commerce.

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STATEMENT OF THE CASE

Background

This case concerns the application of Tennessee's use tax to vessels of a dredging company engaged in dredging the Mississippi River within the boundaries of Tennessee. The Commissioner of Revenue of Tennessee determined that the use of the dredge and its attendant plant at dredging sites in Tennessee and the storage of the dredge in Tennessee for extended periods of time made the dredge subject to Tennessee's general sales and use tax, since no sales or use tax had been paid with respect to these vessels in any other state.

Agents of the Commissioner audited the petitioner for the period from January 1, 1980 through December 31, 1982 and determined a use tax liability of $571,552.43, including penalty and interest, based on the undisputed depreciated value of the vessels. Petitioner paid this amount under protest on August 18, 1983 and filed suit on December 14, 1983 in the Chancery Court of Shelby County, Tennessee, in accordance with Tennessee tax procedures. (Pet. App. 76). Petitioner's complaint was based on the assertion that it was exempt from the Tennessee use tax pursuant to TENN. CODE ANN. § 67-6-321, which provides an exemption for vessels used in interstate commerce from the tax otherwise applicable. Although petitioner alleged in its complaint that the tax violated the Commerce Clause of the United States Constitution, Article I, section 8, clause 3, (Pet. App. 80, ¶ 13), it conceded that issue at trial and did not raise it throughout the State court proceedings.

Trial was held in the Chancery Court of Shelby County, Tennessee, on May 6, 1986, before the Honorable D. J.

Alissandratos, Chancellor, who ruled from the bench in favor of the plaintiff. (Pet. App. 36, 40). Upon direct appeal to the Supreme Court of Tennessee, the trial court decision was reversed and the tax liability was upheld. 742 S.W.2d 259. (Pet. App. 1, 2). Petitioner now seeks review by this Honorable Court.

Basis of the Assessment

Petitioner, Bean Dredging Corporation, contracted with the United States Corps of Engineers to do dredging work on the Mississippi River between River Miles 599 and 800, pursuant to separate contracts for the years 1980, 1981, and 1982. R. 26, Stipulation, ¶ 6. In performance of this contract petitioner was to remove silt and impediments from the river as directed by the Corps of Engineers from time to time. The main vessel used in dredging was the *Lenel Bean,* a self-propelled, dustpan suction dredge. A number of associated vessels accompanied the dredge, including the Richelle (a derrick barge), the Tender Robyn (a crew boat), the Recon IV (a survey boat), and several barges constituting a pipeline used in depositing dredged material at designated areas. R. 27, Stipulation, ¶ 8.

The dredge first entered Tennessee waters on May 27, 1980. R. 27, Exhibit H to Stipulation — Document entitled "Summary of Locations." It proceeded to work at various sites in the Mississippi River, be they in Tennessee, Arkansas, or Mississippi. Between particular assignments, the dredge would dock at McKellar Lake, south of downtown Memphis in Shelby County, Tennessee. The dredge would remain there during high water periods or otherwise until the Corps of Engineers requested petitioner to perform an assignment. R. 26, Stipulation, ¶ 6.

During its docking in McKellar Lake, routine maintenance and repairs would be done, and some of the crew might be laid off, depending on the length of docking.

When dredging at a site, the *Lenel Bean* would be held in place by wires anchored at several places in the river. These wires are 5500 feet long, thus limiting movement of the dredge within that range. Tr. 33. Upon completing its assignment at a site, the process of preparing to move the dredge would require 1-1/2 to 2 hours. (Tr. 24). During operation the dredge would suck silt, rock, etc. from the bottom of the river; the pipeline would then carry it to a deposit site. The site of dredging and the place of deposit could be no more than 1000 feet apart, that being the length of the pipeline. (Tr. 51, 53). At some locations, both sides of the river are in Tennessee (Tr. at 34); at other locations, the west bank is in Arkansas. While the entire dredging process at a site might be in Tennessee, it would not be unusual for the dredging area to be in one state and the discharge area in another. (Tr. 39).

McKellar Lake is the base of operations of the dredge in the Tennessee area. When the dredge is "idle", it is contractually obligated to be in service within five days after notification of a job site by the Corps of Engineers. (Tr. 43-44, 59). The operators of the dredge do not know when or where it will be called into service, and they may choose to demobilize the plant while awaiting an assignment. R. 26, Exhibits E, F, & G to Stipulation, at page 2A-2. During idle periods, repairs are made, but no compensation is earned under the contract unless the *Lenel Bean* is actually dredging, or engaged in mobilization. (Tr. 61, 64-65).

During the 1980-1982 period at issue, the *Lenel Bean* anchored in McKellar Lake, Tennessee, on a number of occasions, sometimes for a few days, sometimes for many months. R. 27, Exhibit H to Stipulation. These periods when the dredge was idle at McKellar Lake are as follows:

May 27, 1980 through June 30, 1980

Aug. 22, 1980 through Aug. 31, 1980

Nov. 7, 1980 through Nov. 17, 1980

June 2, 1981 through July 19, 1981

Nov. 1, 1981 through Aug. 6, 1982

Sept. 23, 1982 through Dec. 31, 1982

(Tr. 59; R. 27, Exhibit H — Document entitled "Summary of Locations")

These periods vary in length from nine days to more than nine months. During these periods no material was dredged and no compensation earned therefrom. Captain Davis of the *Lenel Bean* regards the dredge as having been "shut down" during these times. (Tr. 46). Most of the crew is laid off, and only a skeleton crew is maintained during such idle periods. (Tr. 49, 60). Between assignments by the Corps, the dredge is free to do as it pleases. Between the 1980 and 1981 summer dredging periods, the *Lenel Bean* left the Memphis area altogether and worked in Mobile Bay, Alabama. R. 27, Exhibit H, Document entitled "Summary of Locations."

Pursuant to audit, the Commissioner of Revenue determined that the petitioner became liable for the Tennessee use tax when the dredge entered the State of Tennessee and did work within the State, since petitioner exer-

cised the privilege of using the vessels in Tennessee and had paid no sales or use tax in any state.[1] The Commissioner further determined that plaintiff incurred tax, alternatively, upon the storage of the vessels at McKellar Lake during periods of docking there, which also constitutes a taxable incident. The plaintiff resisted this assessment, contending that the dredge was at all times engaged in interstate commerce and was thus exempt from Tennessee use taxes under State law, TENN. CODE ANN. § 67-6-321. It asserted that the periods of docking were a part of its operations and that the vessels were still in interstate commerce during those periods. The instant litigation resulted.

Proceedings in State Court

Petitioner now asserts that the imposition of Tennessee's use tax upon it is in violation of the Commerce Clause of the United States Constitution. Although this contention was made in the original complaint (Pet. App. 80, ¶ 13), it was expressly and repeatedly conceded by petitioner in both the trial and appellate courts. Instead, petitioner contended only that the *Lenel Bean* was exempt from sales or use tax pursuant to TENN. CODE ANN. § 67-6-321, which exempts vessels used in interstate commerce. The decision in the State courts turned upon whether the dredge's activities in Tennessee were in inter-

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[1] Petitioner subsequently showed that sales tax of approximately $1,333.75 was paid to the State of Louisiana on one of the smaller ancillary vessels. R. 27, Stipulation, ¶ 9, Exhibit I. The Commissioner thus agreed that the tax liability should be reduced by this sum, plus attributable interest and penalty. This was recognized by the Supreme Court in its decision. 742 S.W.2d at 262. (Pet. App. 9-10).

state commerce within the meaning of the Tennesse statute. Petitioner conceded that Tennessee had the constitutional power to tax the dredge even if it were deemed to be in interstate commerce, and alleged merely that Tennessee had not extended its taxing statutes to their federal constitutional limits.

Petitioner's failure to raise any federal constitutional issue is apparent in its trial briefs. (Pet. App. 43, 44, 53). It was also expressly stated at trial in the opening statement of petitioner's counsel, as follows:

> I would also state, your Honor, that *we're not dealing here with United States constitutional limitations on taxation.* We recognize that there are aspects of interstate commerce that states can tax. However, *it's clear that the State of Tennessee has elected to exempt numerous activities from Tennessee taxation that could be taxed without violating the U.S. Constitution, and that's precisely what we have here.* This exemption statute itself is an exemption from areas that could well be taxed without violating the U.S. Constitution. So we're not dealing with the constitutional limitations. And there are a number of cases that say you don't violate the U.S. Constitution by certain activities, but they are not in the face of an exemption statute such as Tennessee's. (emphasis added)

Tr. 9-10 (Respondent's Appendix at 5).

The same approach was taken in petitioner's brief before the Tennessee Supreme Court. (Pet. App. 15, 16). The issues raised in that brief turn exclusively on Tennessee statutes, and the Commerce Clause is not invoked. That brief, as well as petitioner's oral argument before the Tennessee Supreme Court, led that Court to observe in its reported opinion:

> Appellee [Bean Dredging Corporation] concedes that the operation of its property within Tennessee territory during the tax years involved was clearly sufficient to subject it to the taxing power of the state. There is no claim of exemption under the Commerce Clause of the United States Constitution. Appellee relies solely upon the exemption contained in T.C.A. § 67-6-321 as follows . . . .

742 S.W.2d at 261 (Pet. App. 5-6).

Thus petitioner did not merely fail to raise the federal constitutional issue before the State courts; instead it expressly conceded and waived that issue. Petitioner now seeks to raise the federal constitutional issue under the Commerce Clause before this High Court.

SUMMARY OF ARGUMENT

On review by writ of certiorari, this Court will review only federal questions which were appropriately raised and decided by the courts below. The Commissioner of Revenue submits that a granting of the writ would thus be improper in this case, since the Commerce Clause issue raised by petitioner in this Court was not raised below, but instead was expressly conceded and waived.

Concerning the merits of the Commerce Clause claim, it is well settled that a state may levy a tax on aspects of interstate commerce, so long as the criteria set forth in this Court's *Complete Auto Transit* decision are satisfied. The Commissioner submits that the Tennessee Supreme Court has correctly decided that petitioner's activities in

Tennessee were not in interstate commerce, since dredging is a localized activity by nature, and since the dredge was stored in Tennessee for lengthy periods. The Commissioner asserts, however, that even if the dredge's activities were regarded as interstate commerce, Tennessee may constitutionally impose its use tax on them. The instant tax clearly meets all the factors of the *Complete Auto Transit* test and fully comports with the Commerce Clause, even if the dredge were to be regarded as being in interstate commerce.

The decision of the Tennessee Supreme Court is manifestly correct and does not violate the Commerce Clause. This case presents no novel or unsettled questions of law that would justify the granting of the writ.

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ARGUMENT

I.

PETITIONER FAILED TO RAISE ANY COMMERCE CLAUSE ISSUE BEFORE THE STATE COURTS AND IS PRECLUDED FROM DOING SO NOW.

In order for this Court to have jurisdiction under 28 U.S.C. § 1257 by writ of certiorari, it is essential that a substantial federal question have been properly raised in the state court proceedings. R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 3.25 (5th ed. 1978). This is a cardinal rule of appellate practice. Unless the federal question has been raised below, the validity of a statute has not been "drawn in question," or a federal

title, right, privilege, or immunity has not been "specially set up or claimed," as required by the language of 28 U.S.C. § 1257(3), the statute authorizing review by writ of certiorari. This Court, both by reason of law and common sense, "cannot decide issues raised for the first time here," *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999, 35 L. Ed. 2d 346, 348 (1973); *Ramsey v. United Mine Workers*, 401 U.S. 302, 312, 91 S. Ct. 658, 665, 28 L. Ed. 2d 64, 72 (1971); *Cardinale v. Louisiana*, 349 U.S. 437, 438-39, 89 S. Ct. 1161, 1162-63, 22 L. Ed. 2d 398, 400-01 (1969). It is well established that the Supreme Court is vested with no jurisdiction unless a federal question was raised and decided in the state court below. *Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308, 334, 88 S. Ct. 1601, 1616-18, 20 L. Ed. 2d 603, 621-22 (1968) (Harlan, J., dissenting); *Crowell v. Randell*, 10 Pet. (35 U.S.) 368, 391, 9 L. Ed. 458, 467 (1836).

In the instant case, the Commerce Clause issue that the taxpayer now advances was not raised in the state courts, but was expressly conceded. As previously noted, the taxpayer's counsel at trial told the judge, "[W]e're not dealing here with United States constitutional limitations on taxation." Tr. 9 (Respondent's Appendix at 5). He went on to say that the case concerned activities that Tennessee could tax under the Federal Constitution, but which were allegedly exempted by state law. *Id.* Thus despite the mentioning of the Commerce Clause issue in the original complaint, that contention was not addressed by the trial court.

Regardless of whether a federal issue was raised in the trial court, it must also be pursued on appeal. *See Beck v. Washington*, 369 U.S. 451, 549-54, 82 S. Ct. 955,

960-62, 8 L. Ed. 2d 98, 107-09 (1962); *Wolfe v. North Carolina*, 364 U.S. 177, 195, 80 S. Ct. 1482, 1492, 4 L. Ed. 2d 1650, 1662 (1960). Here the taxpayer did not mention the federal issue in its briefs, but instead expressly conceded the state's constitutional taxing power. As the Tennessee Supreme Court stated, the taxpayer

> concede[d] that the operation of its property within Tennessee territory during the tax years involved was clearly sufficient to subject it to the taxing power of the state.

742 S.W.2d at 261 (Pet. App. 5). There was no claim of exemption under the Commerce Clause, but rather under TENN. CODE ANN. § 67-6-321 above. *Id.* (Pet. App. 5-6).

Thus the Tennessee Supreme Court had no reason to address the Commerce Clause issue, and did not do so. Because the federal question was not addressed below, this Court may not entertain it on writ of certiorari. *See Adler v. Board of Education*, 342 U.S. 485, 496, 72 S. Ct. 380, 386-87, 96 L. Ed. 517, 526 (1952); *State Farm Mutual Insurance Co. v. Duel*, 324 U.S. 154, 160-61, 65 S. Ct. 573, 576-77, 89 L. Ed. 812, 818 (1945).

The taxpayer is simply attempting to obtain review by this Court of a question which was not addressed by the state courts. The issue was not addressed in the state forums because the taxpayer failed to brief or argue it and instead expressly conceded the issue. It clearly is improper to present an issue to this High Court on such a state court record.

Therefore, the Commissioner submits that these procedural defects justify denial of the petition for writ of certiorari.

II.

IMPOSITION OF TENNESSEE'S USE TAX ON PETITIONER'S DREDGE DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. Background under the Tennessee Use Tax.

On the merits of the taxpayer's constitutional claim, the Commissioner submits that under well-established precedents the instant tax does not violate the Commerce Clause. The taxpayer's counsel did not err in conceding the federal issue in State court, as noted *supra;* instead he was aware that the taxpayer's only plausible argument was under Tennessee law. There simply is no doubt about the power of a state to impose sales and use tax on property sold and used within the state, even on property involved in interstate commerce.

Tennessee's use tax is part of the sales tax scheme. TENN. CODE ANN. § 67-6-201 levies a tax upon every person "who engages in the business of selling tangible personal property at retail in this state, or who uses or consumes in this state any item or article of tangible personal property . . . ." The design of the use tax is to complement the sales tax by taxing any article that is purchased in another state free from tax and then brought into Tennessee for use. The dredge subjected to tax by Tennessee was not taxed in any other state upon its acquisition. At the Tennessee courts have observed,

> The use tax is complimentary to the sales tax and is applicable with respect to tangible personal property imported from outside the state and used by the importer within the state. Each such use is defined to be the equivalent of a sale at retail to which the appropriate tax should immediately apply.

Vector Company, Inc. v. Benson, 491 S.W.2d 612, 613 (Tenn. 1973).

The issue tried in this case below was whether the petitioner was exempted by Tennessee law pursuant to TENN. CODE ANN. § 67-6-321, which exempts a vessel from use tax so long as it is being used in interstate commerce. It is settled by the decision below that under Tennessee law, the dredge is not so exempted.

The taxpayer now turns to federal law and presents a Commerce Clause issue. It is the Commissioner's position that the dredging activities and storage of the *Lenel Bean* in Tennessee were localized events not in interstate commerce, and thus clearly subject to Tennessee's taxing power. Moreover, even if these events were regarded as being in interstate commerce, the instant tax may still be imposed under the rationale of *Complete Auto Transit*. Thus in no event is there a Commerce Clause violation.

B. The Dredging and Storage of the Lenel Bean were Localized Activities not in Interstate Commerce.

The record establishes that the *Lenel Bean* on numerous occasions has dredged in Tennessee waters. That it has also dredged in Mississippi or Arkansas is irrelevant. While the Mississippi River is quite clearly an artery of interstate commerce, and while the petitioner's dredging contributes to the navigability of that river, the dredging itself is a localized activity that is not a part of interstate commerce. Just as a road contractor would be subject to use tax upon his bulldozers used in repairing an interstate highway, petitioner is taxable for its dredging of the river.

Neither activity accords any immunity from state taxation. Many sorts of activities within a state may aid interstate commerce, but that does not make them a part of interstate commerce for purposes of state taxation.

A number of courts have considered this question and concluded with virtual unanimity that dredging is a localized activity. Perhaps the leading case is *Great Lakes Dredge & Dock Co. v. Department of Taxation and Finance*, 39 N.Y.2d 75, 346 N.E.2d 796, 382 N.Y.S.2d 958, *cert. denied*, 429 U.S. 832, 97 S. Ct. 95, 50 L. Ed. 2d 97 (1976), which is both factually and legally indistinguishable from the instant case. There a New Jersey dredge company had been assessed on two dredges and associated equipment used in New York operations, including the dredging of New York City's harbor. New York had a statute, exactly like Tennessee's, which exempted from use tax "vessels primarily engaged in interstate or foreign commerce . . . ." The New York Court of Appeals upheld a use tax assessment, and this Court denied certiorari. The factual setting of the case is remarkably similar to the instant one. The vessels were moved across state lines to reach a dredging site. While the dredge performed its work at a site, its tugboats and scows did cross state lines in hauling disposal materials to dump their loads. The intermediate appellate court struck the liability because the vessels were improving arteries of interstate travel and were continually moving from state to state. *Great Lakes Dredge & Dock Co. v. State Tax Commission*, 46 A.D.2d 533, 363 N.Y.S.2d 647 (1975). The state's highest court, however, reversed and found the dredge company subject to New York tax.

In upholding the tax, the highest court in New York wrote:

> Nor can it be successfully contended that vessels and supplies used in dredging operations are still in the stream of interstate commerce or do not have a taxable moment in this State ....

346 N.E.2d at 798. The Court reasoned that while dredging vessels are mobile, the movement is incidental to the localized activity of dredging. Nor was it significant that work was performed on interstate waterways, since the dredging was a taxable local event, separate and distinct from interstate commerce.

Other cases adopting the same line of reasoning include *Atlantic Gulf & Pacific Co. v. Gerosa*, 16 N.Y.2d 1, 209 N.E.2d 86, 261 N.Y.S.2d 32, *appeal dismissed*, 382 U.S. 368, 86 S. Ct. 553, 15 L. Ed. 2d 426 (1965); *Great Lakes Dredge & Dock Co v. Norberg*, 369 A.2d 1101 (R.I. 1977); and *Diversacon Industries, Inc. v. Graham*, 429 So. 2d 1269 (Fla. App. 1983). The petitioner's attempt to distinguish these cases by differentiating between types of dredges, such as between "dustpan," "clam shell," and "cutterhead" dredges, did not impress the Tennessee Supreme Court and bears no relevance to the real issues before this Court.

In addition, the anchoring of the dredge at McKellar Lake in Shelby County, Tennessee, for weeks or months at a time was not a part of interstate commerce and amounted to a taxable "storage". Tennessee's sales and use tax expressly applies not only to sales at retail, use, and consumption, but to storage of any tangible personal property within the State. TENN. CODE ANN. §§ 67-6-

201, 67-6-102(16). In this instance, the dredge was repeatedly anchored at McKellar Lake for periods varying from a few days to nine months. Even if interstate commerce were implicated, the anchoring of the dredge at McKellar Lake is clearly sufficient to remove the dredge from interstate commerce and make it subject to Tennessee's use tax.

Here the facts indicate that the *Lenel Bean*, when it has completed an assignment, anchors at McKellar Lake in Memphis, Tennessee to await its next assignment. The taxpayer refers to this as "standing-by;" its records consider it idle time. (Tr. 59; R. 27, Stipulation, Exhibit H). At periods when dredging is not needed on the Mississippi, such as during high water, the dredge may remain inactive at McKellar Lake for weeks or months at a time. McKellar Lake is the dredge's home base in the area, from which it goes forth to do particular assignments. During its periods at the lake, customary repairs or maintenance may be done. If the dredge is expected to remain idle for a considerable time, most of the crew is laid off. (Tr. 49, 60). No compensation is earned during these periods. These facts clearly reflect a taxable storage of the dredge in Tennessee.

The case law abundantly establishes that commerce may be interrupted in such manner as to create a taxable moment in a state. *See Minnesota v. Blasius*, 290 U.S. 1, 54 S. Ct. 34, 78 L. Ed. 1346 (1947); *Southern Pacific Co. v. Gallagher*, 306 U.S. 167, 59 S. Ct. 389, 83 L. Ed. 586 (1939); *Nashville, C. & St. L. Railroad Co. v. Wallace*, 288 U.S. 249, 53 S. Ct. 345, 77 L. Ed. 730 (1933); *Master Craft Engineering, Inc. v. Dept. of Treasury*, 141 Mich.

App. 56, 366 N.W.2d 235 (1985). *Sunstrand Corp. v. Dept. of Revenue*, 34 Ill. App. 3d 694, 339 N.E.2d 351 (1975); *Vector Company v. Benson*, 491 S.W.2d 612 (Tenn. 1973). The docking of the *Lenel Bean* at McKellar Lake falls well within these categories. The dredge anchors, or docks, or stands by, at McKellar Lake upon finishing one assignment to await its next call. Repairs may be done in the interim. Most of the crew is laid off. While so docked, there is no certainty as to where the next place of employment will be, whether in Tennessee or another state. During one such period within the scope of the audit, the dredge remained idle for more than nine months, during which time no compensation was earned and no material was dredged. Obviously during such times the dredge is not in interstate commerce and is subject to Tennessee's use tax on storage.

Consequently, the localized dredging activity of petitioner in Tennessee and the storage of its vessel there are not part of interstate commerce and are fully subject to state taxation. The Commerce Clause is no impediment to such taxation, as embodied in the instant assessment. Just as this Court refused to review the *Great Lakes Dredge* case, it should decline review of the instant case. 429 U.S. 832, 97 S. Ct. 95, 50 L. Ed. 2d 97 (1976).

C. Even If the Taxpayer's Activities Were Regarded as Interstate Commerce, They are Subject to State Taxation.

If the activities in which Bean Dredging engages were treated as interstate commerce, they would still be subject to Tennessee's use tax. A state tax on interstate commerce is not unconstitutional per se. In *Complete Auto*

Transit, Inc. v. Brady, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326 (1977), this Court set forth four factors to determine the constitutionality of a state tax against a Commerce Clause challenge: (1) whether the tax is applied to an activity with a substantial nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; and (4) whether the tax is fairly related to the services provided by the taxing state. *See Wardair Canada, Inc. v. Florida Department of Revenue*, — U.S. —, 106 S. Ct. 2369, 2373, 91 L. Ed. 2d 1, 10 (1986). It is abundantly clear that the Tennessee tax meets each of these tests easily.

1. Petitioner's activity has a substantial nexus with Tennessee.

Petitioner's dredging activities occurred repeatedly within the boundaries of Tennessee, and the dredge was anchored in Tennessee for as long as nine months. The use tax has been imposed on the use of the dredge and its attendant plant in Tennessee. Thus it cannot be doubted that Tennessee has sufficient nexus with the activity being taxed.

2. The tax is fairly apportioned.

The instant tax is calculated on the value of the vessels used in Tennessee. A state clearly may base a tax on the value of property used within its borders. The use tax is a compensating tax that works in tandem with the sales tax. Tennessee levies its use tax only when property has not been subjected to sales or use tax in another state. One of the use tax statutes, TENN. CODE

ANN. § 67-6-210, expressly provides that there shall be no duplication of the tax in any event. As the Tennessee Supreme Court has repeatedly pronounced:

> Thus, it was the legislative intent, as manifested in Section [67-6-210], T.C.A., to impose a use tax on all tangible personal property imported from other states and used and consumed in this state, provided a similar tax, equal to or greater, has not been paid in the exporting state.

Woods v. M.J. Kelley Co., 592 S.W.2d 567, 570 (Tenn. 1980); *Young Sales Corp. v. Benson*, 224 Tenn. 88, 450 S.W.2d 574 (1970).

If a sales or use tax had been paid on the *Lenel Bean* to another jurisdiction, Tennessee would have given credit for that tax, and there would have been no Tennessee tax. There is thus no possibility of multiple taxation in other states.

This is shown by the facts of the instant case. The petitioner after the assessment was made showed that sales tax of approximately $1,333.75 had been paid to the State of Louisiana on one of the smaller ancillary vessels included in the assessment. R. 27, Stipulation, ¶ 9 and Exhibit I. The Commissioner promptly agreed to reduce the tax liability by this sum, plus attributable interest and penalty. The Tennessee Supreme Court recognized this in its decision and ordered the adjustment be made. 742 S.W.2d at 262. (Pet. App. 9-10).

The taxpayer's allegations of multiple taxation thus are obviously spurious. The tax is properly apportioned, since it is based on the value of the vessels used in Ten-

nessee, with respect to which no sales or use tax has been levied in any other jurisdiction.

3. The tax does not discriminate against interstate commerce.

Tennessee's sales and use taxes apply generally to items of tangible personal property, the sale or use of which occurs in Tennessee. There is no discrimination against interstate commerce because a dredge sold or used entirely within Tennessee would be subject to the sales or use tax at exactly the same rate as petitioner. Discrimination arises when an out-of-state taxpayer or transaction is subjected to a different tax than a similar in-state taxpayer or transaction. That clearly is not the case here.

Petitioner contends that the decision in *T.L. Herbert & Sons, Inc. v. Woods*, 539 S.W.2d 28 (Tenn. 1976), is evidence of discrimination. Nothing could be further from the truth. The vessel in *Herbert* was used at all times to transport cargo moving in interstate commerce, and was therefore exempt from tax under TENN. CODE ANN. § 67-6-321. *See* 742 S.W.2d at 261. (Pet. App. 6). If anything, Tennessee under this statute discriminates in favor of those engaged in interstate commerce. As the court below noted, there is a substantial difference between transporting cargo (the prime example of interstate commerce) and a localized activity such as dredging. That *Herbert* involved a Tennessee corporation and this case

a Louisiana corporation had nothing to do with the results, as is apparent from the analyses of the Tennessee Supreme Court.

Thus it is manifest that the instant tax is not a result of discrimination against interstate commerce.

4. The tax is fairly related to services provided by Tennessee.

The imposition of use tax on petitioner's privilege of using the dredge in Tennessee is substantially related to the services Tennessee provides. During the dredge's long periods of docking in Tennessee, for instance, the crew uses the commercial and public facilities of Tennessee. The state and county provide police protection and access to the courts. The transportation facilities and roads of Tennessee are used to get the crew and supplies to and from the vessel. (Tr. 50). Even when the dredge is working in the river, its crew is subject to Tennessee criminal laws, and necessities are provided them from shore. The operators and crew are afforded the "advantages of a civilized society." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981). Thus there is no doubt that the tax on use of the dredge is fairly related to services provided by Tennessee in connection with the presence and use of the dredge in the state, under the *Commonwealth Edison* rationale.

Petitioner intimates that its performance under a federal contract with the U.S. Corps of Engineers is somehow relevant. There is no assertion, however, that petitioner was an agent of the United States so as to acquire any immunity from state taxation. Absent such incorporation into the governmental structure, federal contractors are fully subject to nondiscriminatory state taxation. *See United States v. New Mexico,* 455 U.S. 720, 102 S. Ct. 1373, 71 L. Ed. 2d 580 (1982); *United States v. Boyd,* 378 U.S. 39, 84 S. Ct. 1518, 12 L. Ed. 2d 713 (1964).

For these reasons, even if the petitioner were deemed to be in interstate commerce, the instant use tax fully satisfies the test of *Complete Auto Transit.* Thus its imposition does not violate the Commerce Clause.

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CONCLUSION

This case does not merit this Court's consideration. The Commerce Clause issue which the taxpayer now raises was conceded below and was not addressed by the Tennessee courts. Moreover, the tax has been imposed on activities that are not a part of interstate commerce and thus presents no constitutional question. Even if the taxpayer's activities are regarded as interstate commerce, the instant tax easily meets all elements of the *Complete Auto Transit* standard and is permissible under the Commerce Clause. This case does not present any novel questions of law. All the isses it involves have previously been firmly and correctly settled.

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Opening Statements of Counsel
at Trial before the Chancery Court
of Shelby County, Tennessee, Part 3,
on May 6, 1986

(From the Transcript of the
Hearing, pages 4-12)

(p. 4) THE COURT: Gentlemen, did you all want to waive opening statement.

MR. RHODES: Let us make a brief opening statement.

THE COURT: Sure.

MR. RHODES: Your Honor, I'm Boyd Rhodes and joining me in representing the plaintiff is Mike Richards and also Mr. John Rouchell of the New Orleans bar. We'd ask that he be allowed to join us at the counsel table.

THE COURT: Sure.

MR. RHODES: Also in the courtroom is Eric Tanzberger who is an officer of Bean Dredging Corporation.

This is a refund suit, your Honor, for Tennessee use taxes paid under protest. There are no issues regarding the procedural aspects of payment under protest or jurisdictional venue. It involves the application of Tennessee's exemption statute exempting from the use tax vessels of over 50 tons of displacement used in interstate commerce. There are only three criteria that we have to meet for that. The proof will show that all of those criteria are met.

(p. 5) This vessel is a dredge. The dredging involves the dredge itself and some ancillary vessels which constitute the attendant plant. The attendant plant and everything must be in place in order to function as a dredge. You have to have the crew boat and the reconnaisance boat and the pipeline barges in order to transport material and fulfill the function of the dredge.

The dredge itself, the Lenel Bean is a special type of dredge called a dustpan dredge. It's specifically designed for use on the Mississippi River, specifically designed to rapidly move from one shoal area to another shoal area and to be able to rapidly move within the shoal area itself in order to allow other boats and vessels to pass during the dredging process.

The dredge transports the shoal material, the silt, through a pipeline to a discharge area. The discharge area where the material is transported to as well as the area that is dredged are both designated by the U.S. Corps of Engineers. There's a specific process, a specific surveying done to designate those portions and the witness will illustrate that.

These shoals usually occur where the (p. 6) channel of the river crosses from one side of the river to the other and as a result the Lenel Bean would typically be astride the border of the states in the Mississippi River when it's dredging. It would dredge from—the front of the vessel would be in one state and the discharge pipe would be in another state.

In addition, during the dredging process shore stations are set up on all banks. There are at least four and

frequently more shore stations set up. And obviously these shore stations are in different states. And constant communication is maintained with those shore stations. It's sort of an automatic process which keeps the dredge itself precisely in the dredging area designated by the Corps of Engineers.

What we have is a continual communication across state lines. We frequently have an actual straddle of the vessel across state lines as it's dredging. And then the dredge itself, this particular special type of dustpan dredge, is actually under continual movement during the dredging process, it's not merely anchored in one spot for dredging.

There is a Corps of Engineers contract (p. 7) which directs this vessel where to dredge. The Corps of Engineers designates the sites. The Corps of Engineers actually has Corps personnel on board the vessel, the inspectors are on board, and the inspectors also carry with them Corps of Engineers equipment, radios and survey type equipment. And the Corps of Engineers considers these inspectors to be passengers while they are on board the vessel.

So in short, the Lenel Bean would transport material, the shoal material, it would also transport passengers, transports them on the Mississippi River, it transports them across state lines, and it's about as interstate commerce we feel as there can be.

There is one case, one New York case, which holds that a dredge is not in interstate commerce under an exemption statute similar to Tennessee's exemption, but that was on a specific finding of fact in that case that

the dredge itself never crossed the state lines. The dredge there was a clamshell dredge as opposed to a dustpan dredge. The clamshell dredge would lift the material from the bottom, put it into a vessel, into another scow, and that scow would go across (p. 8) state lines to discharge the dredged material. So it's a substantially different dredging operation than we have here on the Mississippi River.

On the plaintiff's side there is a Maryland case very much like the Tennessee exemption which clearly holds that the dredging operation is in interstate commerce.

The Commissioner will want to talk a lot about storage, that if the Lenel Bean ever was in interstate commerce, that once it is anchored down in McKellar Lake during high water, that that takes it out of interstate commerce and that constitutes storage of the vessel.

The proof will show that even when the Lenel Bean is down in McKellar Lake it maintains a crew on board 24 hours a day. The engines and generators are running 24 hours a day, seven days a week. Navigation lights, air conditioning, heating is maintained. And the vessel is actually moved from time to time depending on weather and the river stages, anchor lines are changed, the vessel literally moves down there, the crew moves the vessel, short distances, but it is moved.

Of course, the Herbert case even goes further and says under the Tennessee exemption (p. 9) statute even if a vessel comes to rest in Tennessee and even if a vessel becomes part of the mass of property in Tennessee the exemption still applies, it's still in interstate commerce within the meaning of the exemption.

The Lenel Bean during these periods of anchoring in McKellar Lake during high water—there's no proof whatsoever that the vessel was ever out of service, there's no mothballing, there's no dry docking, it's maintained in a full state of readiness to respond to Corps of Engineers' directions.

I would also state, your Honor, that we're not dealing here with United States constitutional limitations on taxation. We recognize that there are aspects of interstate commerce that states can tax. However, it's clear that the State of Tennessee has elected to exempt numerous activities from Tennessee taxation that could be taxed without violating the U. S. Constitution, and that's precisely what we have here. This exemption statute itself is an exemption from areas that could well be taxed without violating the U. S. Constitution. So we're not dealing with the constitutional (p. 10) limitations. And there are a number of cases that say you don't violate the U. S. Constitution by certain activities, but they are not in the face of an exemption statute such as Tennessee's. In particular, there's no case anywhere that's been cited in which any airplanes like the Federal Express case or trucks and trailers, where any of those items have been considered to be stored or taken out of interstate commerce in circumstances like we have in Bean where the crew remains on board at all times, where the generators are running 24 hours a day, the lights are maintained in operation and the vessel actually moves with the changes in weather and river stage.

A stipulation has been filed, a thick stipulation. There are no procedural matters at issue. Your Honor, we would also orally stipulate that Bean actually filed ap-

propriate—actually filed sales and use tax returns for each of the years and periods at issue here. We suggest that all the proof and application of the law will show that the vessel is clearly within the Tennessee exemption statute and should not be taxed.

THE COURT: Thank you, sir.

MR. LEWIS: Your Honor, I am Larry (p. 11) Lewis representing the Commissioner of Revenue. Martin Giner of our office is assisting me today. Also we have here Virginia Adams of the Department of Revenue who will briefly testify. We would designate her as the department representative.

Let me briefly state, your Honor, that this is very simply a case of whether Bean Dredging has sufficient nexus with the State of Tennessee to be subject to use tax here on its dredges.

As the briefs note, this boils down to one or maybe two questions. That first question is whether or not the one dredge, the Lenel Bean, and its associated vessels are in interstate commerce within the meaning of TCA Section 67-6-321. We believe that dredging is a localized activity which certainly aids commerce but which is fully within the State's taxing powers and which is not within the stream of interstate commerce. I won't go into case authorities at this point. There are cases in a number of states including New York, Rhode Island and Florida and other jurisdictions that have long held that dredging is not interstate commerce.

Secondly, your Honor, we contend that (p. 12) when the dredge is anchored at McKellar Lake in Tennessee for

very considerable periods of time ranging from a few weeks to a few months to many months, that clearly it is not dredging during those periods, it is not in interstate commerce if it ever were in interstate commerce and, therefore, it is taxable.

In short, your Honor, we believe that the plaintiff here, Bean Dredging Corporation, has taken advantages of the waterways and facilities in Tennessee to conduct its very profitable business. It is not just, fair for it to use and keep its property here for extended periods of time without ever paying sales tax or use tax to this or any other jurisdiction. It is our assertion that the Tennessee statute does not and was never intended to exempt an activity of this sort which is localized and by several authorities it is not in interstate commerce.

Thank you, your Honor.

THE COURT: Thank you, sir.

Let's please proceed with the first witness.